



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO 77 OF 2014

REPUBLICPROSECUTOR

VERSUS

RAPHAEL MUOKI KALUNGU.....ACCUSED

RULING

The accused, Raphael Muoki Kalungu, has moved this court through his legal representative Ms Kethi Kilonzo instructed by Kilonzo & Company Advocates by a Notice of Motion dated 28th September 2015. He has cited Article 50 of the Constitution and seeks orders directed at Safaricom Limited to supply the following:

- i. Safaricom Short Message Service (SMS) records of the deceased Mary Waruguru Maina on mobile number 0723012294 from 5th July 2014 to 7th July 2014.
- ii. Safaricom call data records of the deceased Mary Waruguru Maina on mobile number 0723012294 from 5th July 2014 to 7th July 2014.
- iii. Cell tower and the name of the location of the cell tower of any call data records of the deceased Mary Waruguru Maina on mobile number 0723012294 from 5th July 2014 to 7th July 2014.
- iv. The International Mobile Station Equipment Identity (IMEI) number and location of the mobile phone paired to Subscriber Identity or Identification Module (SIM) Card of the deceased Mary Waruguru Maina mobile number 0723012294.

The application is supported by the grounds found on the face of it and on the supporting affidavit of the accused dated 28th September 2015. Ms Kethi Kilonzo also made oral submissions in line with the grounds supporting the application. Counsel submitted that the information the defence is seeking is crucial to the defence case and that this information was not supplied to them by the prosecution.

In brief, the accused, through his counsel requested for the information referred to and sought in this application from Safaricom through a letter dated 18th June 2015. A copy of the letter is annexed to the application and marked "A". A response from Safaricom came in a letter dated 8th July 2015, a copy of which is annexed to the application and marked "B". Safaricom declined to provide the information citing confidentiality of the information and the requirement for a court order before releasing such information.

The application is not opposed. The prosecution counsel Ms Macharia told the court that the prosecution would like to have the same information if it is available because the prosecution does not have it either.

I have considered the application. This court had directed the prosecution to provide the defence with any

materials in respect of this case in their possession in order for the accused to adequately prepare for his defence. It is my understanding that the information now being sought by the defence is not in the possession of the prosecution. It is said to be in the custody of Safaricom Limited. I am of the view that the accused, just like the prosecution on behalf of the State and the family of the victim, are entitled to all the information that may aid their case respectively. In the interest of justice the information sought will not only aid the defence or the prosecution but may also facilitate this court in fairly determining this matter. In my view, Safaricom Limited will not be prejudiced by availing the information sought.

I am inclined to grant the orders sought in this application, which I hereby do. I allow the application dated 28th September 2015 in the terms of prayers (a), (b), (c), and (d) and orders shall issue accordingly.

Dated, signed and delivered in open court this 24th of November 2015.

S.N. MUTUKU

JUDGE

In the presence of:

Ms Mwaniki for the prosecution

Ms Kethi Kilonzo for the accused

Mr. Raphael Muoki Kalungu, the accused

Mr. Daniel Ngumbi, court clerk